Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-8

J. B. O'CONNOR, M.D.,

Petitioner,

—v.—

KENNETH DONALDSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

I. Is there no evidence from which the jury could reasonably have concluded, as it did, that petitioner confined respondent against his will, knowing he was not dangerous and knowing he was not receiving treatment for his alleged mental illness?

II. Is there no evidence from which the jury could reasonably have concluded, as it did, that petitioner's acts were sufficiently malicious, wanton and oppressive to justify punitive damages?

III. Did the Court below err in ruling that a non-dangerous mental patient, not charged with any crime, has a Constitutional right either to treatment or else release?

Statement of the Case

Petitioner O'Connor, though under no statutory or judicial obligation to do so, deprived respondent Kenneth Donaldson of his liberty for fifteen years. He did so even though he knew Donaldson was not dangerous to himself or others. He did so even though he knew Donaldson was receiving only the same custodial care he would have received in a prison. And having the power and authority to release Donaldson, he blocked Donaldson's every effort to be released to the custody of responsible friends and organizations. His acts, as the jury found, were so malicious, wanton and oppressive as to justify not only compensatory damages of $17,000, but punitive damages of $5,000. His defense was that he acted in good faith and did the best he could with limited resources. The jury considered the evidence and found that was not true.

Many of the "facts" listed in the Petition for Certiorari find no support in the evidence. A more accurate and complete summary of the facts of record can be found in the unanimous opinion of the court below, 493 F.2d 507 at 510-515.

Essentially, the Court of Appeals found "ample evidence" to support the following findings of fact:

"A. The defendants unjustifiably withheld from Donaldson specific forms of treatment."

"B. The defendants recklessly failed to attend to and treat Donaldson at precisely those junctures when treatment could have most helped Donaldson recover and therefore be released."

"C. The defendants wantonly, maliciously, or oppressively blocked efforts by responsible and interested friends and organizations to have Donaldson released to their custody."

"D. The defendants continued to confine Donaldson knowing he was not dangerous, or with reckless disregard for whether he was dangerous."

"E. The defendants did not do the best they could with available resources."

Two additional facts should be noted. First, petitioner contends that he had no authority to release Donaldson until he was restored to mental health (Petition, pp. 36-37). That contention is incorrect, and finds no support in the record. To the contrary, a co-defendant, John Gumanis, M.D., confirmed at trial that a patient did not have to recover to be released on furlough or trial visit, and that such releases could be granted even though the patient was still considered to be mentally ill (Transcript of 11/27/72, p. 5). A defense witness, Dr. W. D. Rogers, director of the Florida Division of Mental Health, testified that staff psychiatrists had the authority to "release the patient to family, guardian or to some responsible person," that trial visits were quite common, and that "a large number of patients went out under the trial visit arrangement" (Transcript of 11/27/73, pp. 150-151).

Second, petitioner contends "he should be immune from damages in a situation where he was acting in good faith. . . . " (Petition, p. 40). The trial court agreed with that contention, and so instructed the jury (493 F.2d at 527). The jury found, however, that petitioner acted maliciously,

and in bad faith. Petitioner did not, in the court below, challenge the correctness of the instruction on this point, and the court below found there was "sufficient evidence" to support the jury's finding of bad faith (*id.*).

ARGUMENT

I.

This Case Does Not Present the Traditional Reasons for Granting Certiorari.

A. *Right to Treatment*

The respondent did not claim below that he had a constitutional right to treatment. He claimed, as the court below carefully noted, "that he had a constitutional right to receive treatment or to be released from the state hospital" (493 F.2d at 509).

Accordingly, petitioner was found liable in damages not for failure to provide treatment, or a certain type or level of treatment, but because he refused to release Donaldson even though he knew Donaldson was receiving *no* treatment. As the court below found, "the jury properly could have concluded . . . that the defendants obstructed his release even though they knew he was receiving no treatment" (493 F.2d at 526). That conclusion would not have required "any *a priori* determination of what constitutes or would have constituted adequate treatment, and of course no such determination was made" (*id.*).

The issue then, is not what constitutes adequate treatment, but whether a non-dangerous person can constitutionally be deprived of liberty for 15 years, during which time he is given *no* treatment.

This is, of course, an important issue. But the resolution of that issue by the decision below presents none of the traditional reasons for granting certiorari.

1. There was no dissent.

2. There is no conflict between circuits. To the contrary, decisions in the 7th, 4th and D.C. circuits, though not precisely in point, are certainly consistent with the decision of the Fifth Circuit in this case. *E.g.*, *Nelson* v. *Heyne*, 491 F.2d 352 (7th Cir. 1974); *Sas* v. *Maryland*, 334 F.2d 506 (4th Cir. 1964), *cert. dismissed as improvidently granted sub nom. Murel* v. *Baltimore City Criminal Court*, 407 U.S. 355 (1972); *Rouse* v. *Cameron*, 373 F.2d 541 (D.C. Cir. 1966). And see, *United States ex rel. Schuster* v. *Herold*, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969).

3. The decision below is not inconsistent with prior decisions of this Court. To the contrary, the decision below is compelled by the principles established in the prior decisions of this Court.

In *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972), for example, this Court ruled unanimously that "at the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." The state court order committing Donaldson expressly stated that he was committed for the purpose of receiving "treatment." The evidence showed, however, that "he received only the kind of subsistence level custodial care he would have received in a prison, and perhaps less psychiatric treatment than a

criminally committed inmate would have received" (493 F.2d at 512).

In short, Kenneth Donaldson, charged with no crime, was confined 15 years in an institution that was, in effect, a prison. Surely, under *Jackson*, the "nature" and "duration" of his confinement bore no reasonable relation to the purpose of confinement.*

In *Robinson* v. *California*, 370 U.S. 660 (1962), this Court made it clear that no one may constitutionally be "punished" for the "status" of being mentally ill, and equally clear that confinement of a non-dangerous person in a prison-like institution, without "treatment," constitutes punishment.

Much earlier, in *Greenwood* v. *United States*, 350 U.S. 366 (1956), this Court indicated that "indefinite" or long term hospitalization of non-dangerous persons is constitutionally impermissible. A similar view was expressed more recently in *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972).

It seems fair to conclude, on the particular facts of this case, that the decision below is not only correct, but required by the previous decisions of this Court.

There is an additional reason why certiorari should not be granted to review the existence or non-existence of a constitutional right to treatment or else release. An instruction actually proposed by petitioner, but refused by the trial court, would have authorized the jury to find a *constitutional* violation if they believed petitioner confined Donaldson, knowing he was not receiving adequate treatment (De-

* See also, *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245 (1972).

fendants' Proposed Instruction Number 8).* There is ample evidence to support a jury verdict even under the instruction proposed by petitioner.

B. *Waiver*

Petitioner next contends that if there is a constitutional right to treatment or else release, certiorari should be granted to determine whether Donaldson "waived that right" by refusing, on occasion, certain types of treatment, namely electro-shock therapy and tranquilizing medication (Petition, p. 41).

This contention was not raised by petitioner in his brief to the court below, only by his co-defendant (493 F.2d at 531). Furthermore, the trial court, at defendants' request, instructed the jury as follows: "You are instructed that if Plaintiff through his own actions contributed to the withholding of a particular form of treatment, that Plaintiff is not entitled to collect compensation from the Defendants for the failure to give such treatment during the particular period or periods Plaintiff refused such treatment" (*id.*). Accordingly, the court below unanimously ruled that the "waiver" argument did not have "any merit" (*id.*).

Actually, that instruction was more than fair to defendants. Had Donaldson wished to challenge that instruction, he could have pointed out that it rested on the assumption that a person adjudged to be mentally incompetent can

* "If you believe that defendants, without fault of plaintiff, withheld psychiatric treatment from plaintiff, or allowed his confinement to continue knowing that he was not receiving adequate treatment, you may find that his confinement was illegal under the federal constitution and the Civil Rights Act."

knowingly and intelligently "waive" an important constitutional right. That assumption is inconsistent with the standards governing waiver annuounced in prior decisions of this Court, *E.g., Pate* v. *Robinson*, 383 U.S. 375 (1966); *Covey* v. *Town of Somers*, 351 U.S. 141 (1956); and *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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